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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

ANTHONY JOSEPH CIMINI,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PHILIP A. GILLIS
Attorney for Petitioner
2214 Guardian Building
Detroit, Michigan 48226
WO. 2-1016

Of Counsel:
ROSS B. MERETSKY
817 Penobscot Building
Detroit, Michigan 48226
964-6494

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Anthony Joseph Cimini, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on June 1, 1970.

OPINION BELOW

The District Judge did not file an opinion. The opinion of the Court of Appeals is not yet officially reported. It is printed as Appendix A, *infra*.

JURISDICTION

The Judgment of the Court of Appeals was entered June 1, 1970 (Appendix B, *infra*). A petition for rehearing was denied on July 13, 1970 (Appendix C, *infra*). Jurisdiction is conferred upon this court by 28 U.S.C. §1254.

QUESTIONS INVOLVED

I.

Where, during a criminal trial, the jurors have discussed a newspaper article which identifies a defendant as a Mafia leader, are the assurances of each of the jurors that he would not be influenced by the article, sufficient reason for denying a defense motion for a mistrial?

II.

Where a jury is allowed to separate overnight after their deliberations have commenced in a criminal case and a newspaper article is published during the period of separation mentioning a non-testifying defendant's criminal record and identifying him as a Mafia leader, is it error for the trial Judge to deny a motion for mistrial without asking the jurors whether they have read the article?

III.

Where, during a criminal trial several newspaper articles derogatory to the defense are published, and include a summary of the testimony of a major prosecution witness, and one of the defense counsel calls to the attention of the Court facts indicating that the U.S. Attorney prosecuting the case has supplied some of the information to a newspaper reporter, is it plain error for the trial Court

to refuse to either declare a mistrial or to hold a hearing to determine the extent of the prosecution's responsibility for the prejudicial publicity?

In addition to the foregoing questions, in the event that certiorari is granted unlimited as to scope, petitioner will argue the following additional question.

Is it plain error for the trial judge in a criminal case to allow the jury to separate overnight during their deliberations especially where there is a probability that the news media will carry stories prejudicial to the defendant?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V, provides in part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

2. United States Constitution, Amendment VI, provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

STATEMENT OF FACTS

(Figures in parentheses followed by an "a" refer to pages in the joint appendix filed with the Court of Appeals. Portions of that appendix have been reprinted and attached as Appendix D, infra,)

Petitioner was tried by a jury on an indictment which, in two of three counts, charged him with conspiring with five co-defendants to steal goods from an interstate shipment and with possessing goods stolen while moving in interstate commerce.[1]

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[1] In violation of 18 U.S.C. §§ 371 and 659.

Newspaper Publicity During Trial

Over the week-end recess following the first week of trial, a two-column article appeared on the front page of one of the two major daily newspapers in the area, under the headline "Crime buster is cut from county's payroll." The thrust of the article was that Mr. Carl Ziemba, head of the organized crime division of the County Prosecutor's office, had resigned to join a law firm noted for its representation of reputed Mafia leaders. Because of accumulated vacation time, Mr. Ziemba was still on the county payroll, the article noted, although he "is now defense counsel for one of five members of a reputed $75,000.00 color television theft ring headed by an alleged Mafia boss." In all editions of the paper except the first, the article mentioned the petitioner by name and the fact that he had been identified in 1963 before a United States Senate Committee as a leader of the Mafia (59a, 60a, 131a, D-1).[2]

Each of the jurors was interrogated separately concerning the article. Each said he had not read it although one juror said her husband had read part of it to her. Five jurors said the article was discussed in the jury room briefly and one juror said she discussed it with another juror in the ladies room. Each juror who had heard a discussion of the article was asked if he could render a fair and impartial verdict. They all answered affirmatively and relying upon this, the trial judge denied defense motions for a mistrial (64a, D-2, D-3).

Newspaper Publicity During July Deliberations

The jury received the case on the Wednesday afternoon of the third week of trial. At 5 o'clock they were excused

[2] The "D" references are to Appendix D, infra. There, because the new rules do not require the record to be filed, we have reprinted relevant excerpts from the Joint Appendix.

to go home to return the following morning at 9 A.M. to resume deliberations.

On the following morning at 9:02, the Court received a note from the jury foreman, "Please give us the correct spelling of the defendants' names and their attorneys" (111a, D-6-D-7).

A story had appeared in the Thursday edition of the Detroit Free Press, the morning daily paper whose editions reach the streets at about 8 P.M. of the evening before. The story was headlined "Jury out in TV hijack case." The lead paragraph noted that it was the first case for Mr. Ziemba since he had left the prosecutor's office "to join the law firm noted for its defense of Mafia figures." The concluding paragraph of the article read:

> "Anthony Cimini, [petitioner] of 1315 Balfour, Grosse Pointe Park, was named as a Mafia member by former Detroit Police Commissioner, George Edwards, in a 1963 hearing before a United States Subcommittee. He was convicted last November on a federal charge of transporting stolen securities across the State lines. He is appealing the case." (113a, D-8-D-9).

Each of the defendants moved for a mistrial. The Court was requested to ask the jurors whether they had read the article in the newspaper. The Court denied the motions for mistrial and denied the request to interrogate the jury.

The Possibility that the Government Generated the Publicity

An attorney for one of petitioner's co-defendants[3] argued that from the contents of newspaper articles which had

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[3] It has been agreed that an objection by one defendant was an objection by all [Transcript, p. 259].

been appearing, it was reasonable to infer that the government was supplying the news media with some of the information. He stated that he had observed a reporter for the Detroit News talking to the "government" in the hallway and inquiring "whether he had at that time all of the pertinent information in this matter" to which he received an affirmative reply.[4] The attorney argued this as an additional grounds for mistrial saying "I think the release of this information at this crucial time in the case [during jury deliberations] certainly exhibits a bad faith on the part of the government." The U.S. attorney declined to deny the charge, saying only, "[A]s to the bad face [sic] of the government, I don't want to take the court's time to even get into that" (119a, D-13).

Petitioner was convicted on each of the two counts and given concurrent five year sentences. The Court of Appeals affirmed his conviction on June 1, 1970 and on July 13, 1970 denied a motion for rehearing. In his appeal to the Court of Appeals, petitioner made no point of the fact that the government may have been responsible for some of the derogatory and prejudicial newspaper articles.

REASONS FOR GRANTING THE WRIT

I.

SINCE THE PREJUDICIAL NEWSPAPER ARTICLE PUBLISHED DURING THE TRIAL HAD COME TO THE ATTENTION OF AT LEAST HALF THE JURORS, A MISTRIAL SHOULD HAVE BEEN DECLARED EVEN IN THE FACE OF THE JURORS' INDIVIDUAL ASSURANCES THAT THEY COULD REMAIN IMPARTIAL.

In the Court of Appeals, petitioner relied heavily on *Marshall v. United States* (1959) 360 U.S. 310. The Court

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[4] The attorney's statement is somewhat garbled as transcribed by the reporter. It is reproduced in full in Appendix D *Infra*, p. D-11-D-13.

of Appeals, without reference to *Marshall*, ruled that a new trial was not justified because "Every juror affirmed that no publicity nor any mention of it had affected his ability to render a fair and impartial verdict." Yet *Marshall* plainly stated that such assurances from the jury, given that they had seen the articles, would not overcome the presumption that the defendant had been prejudiced thereby.

> "We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. [case cited] It may indeed be greater for it is then not tempered by protective procedures."[5]

The decision below, so plainly in conflict with *Marshall*, calls for the exercise of this Court's power of supervision. Rule 19(1)(b). Lest it be viewed as an isolated abberration from *Marshall* not important enough to warrant review here, see the latest Sixth Circuit departure. *United States v. Rubino*, decided July 30, 1970, docket #19,621. There, the newspaper article seen by some of the jurors referred to the defendant as "Matthew (Mike the Enforcer) Rubino, reputed Mafia leader." In a divided opinion, the Court affirmed the conviction, relying upon the assurances given by the jurors that they were not influenced, citing *United States v. Cimini*.

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[5] In petitioner's case, the article was at least as derogatory as that in *Marshall*. It is stated that petitioner had been identified before a U.S. Senate Subcommittee as a Mafia leader. He was the first-named person in the indictment and the article described the prosecution as being directed against a "theft ring headed by an alleged Mafia boss," (59a, 131a, D-1).

This Court will not allow a State to afford its citizens only a watered-down version of the Bill of Rights through a narrow construction of the 14th Amendment. Likewise, the right to due process and to an impartial jury in the federal courts should be as fully implemented in the 4 States comprising the Sixth Circuit as in the other 46.

II.

THE TRIAL JUDGE SHOULD HAVE ASKED THE JURORS WHETHER THEY HAD READ THE PREJUDICIAL NEWSPAPER ARTICLE TO WHICH THEY WERE EXPOSED DURING THE OVERNIGHT RECESS IN THEIR DELIBERATIONS. THIS IS THE PROCEDURE REQUIRED IN OTHER CIRCUITS.

The question we tender here is not set in the massive-pretrial-publicity situation of *Sheppard v. Maxwell*, 384 U.S. 333 or *Irvin v. Dowd*, 366 U.S. 717.[6] What is involved is the publication of a highly prejudicial article—describing petitioner as a Mafia leader with a criminal record—and the jurors' exposure to it during the most critical time of the trial, their deliberations.

> "At no time is it more essential that the jury should be immunized from outside influences than when it is engaged in deliberating upon what its verdict is to be." *U.S. v. D'Antonio* (CA-7, 1965) 342 F. 2d 667.

Pretrial publicity does not have the impact on a jury that trial publicity has. It is just another story to one not called upon to decide the fate of a defendant on trial. But trial publicity, brought to his attention, can have an

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[6] Petitioner did seek a continuance of the trial because, in the week preceding its commencement, there were several news articles concerning Mr. Ziemba's decision to trade his white hat for a black one. The denial of the continuance is not now an issue.

impact on the individual juror that even he may not be able to measure accurately. And this can be accomplished by a single sentence or phrase.

The trial judge refused to ask the jurors whether they had seen the article. He reasoned that he had "continually admonished the jury not to read the paper" (120a, D-14) and "the presumption is on the Court's part to assume that they have [not] violated their oaths" [121a].[7]

This ruling is in clear conflict with the holdings of the Seventh Circuit.

> "Thus, the progedure required by this Circuit where prejudicial publicity is brought to the court's attention during a trial is that the court must ascertain if any jurors who had been exposed to such publicity had read or heard the same." *Margoles v. United States* (1969) 407 F.2d 727, 735.
>
> "Under our supervisory power, we find it necessary to remand the case for a new trial in which the district judge should not consider opposition to sequestration of the jury as constituting a waiver of

[7] The "presumption" which the court spoke of was overcome by the record. On the opening day of trial and nearly every afternoon adjournment thereafter, the court advised the jury not to read the papers, watch television or listen to the radio. Yet 6 jurors had discussed the newspaper article which appeared after the third day of trial. Furthermore, the article published during deliberation prominently featured the fact that a co-defendant's attorney had recently left the organized crime section of the prosecutor's office. In this light, the note that the jury sent out on Thursday morning "Please give us the correct spelling of the defendants' names *and their attorneys*" should have raised at least a suspicion that some of the jurors had read the article.

We mention this in footnote only so as not to detract from the legal issue presented—whether such a presumption is valid even when there is no contraindication in the record.

the right to question the jury as to prejudicial publicity." *United States v. Palermo* (1969) 410 F. 2d 468, 472.

A like rule exists in the District of Columbia Circuit, *Coppedge v. United States* (1959) 272 F.2d 504, 508; and in the Tenth Circuit, *Mares v. United States* (1967) 383 F.2d 805, 809.

The conflict requires resolution by this Court.

III.

THE ATTENTION OF THE COURT HAVING BEEN DRAWN TO THE POSSIBILITY THAT SOME OF THE TRIAL PUBLICITY ADVERSE TO THE DEFENSE WAS GENERATED BY THE GOVERNMENT, A HEARING SHOULD HAVE BEEN HELD TO DETERMINE THE FACTS.

In *Sheppard*, this Court spoke in general terms of the power and duty of trial judges to control the dissemination of prejudicial pretrial and trial publicity by the litigants and their attorneys. The Court was required to speak in constitutional terms since the case was a habeas corpus proceeding to review a State court conviction.

Here, the Court can speak without such limitation in the exercise of its supervisory power over proceedings in federal courts. The issue has not been fully explored and the specifics of this case allow the Court to give concrete guidelines to the lower courts.

Some were explored by the Second Circuit in *United States v. Desist* (1967) 384 F.2d 889, but, unfortunately, the record there, unlike the one below, did not warrant full discussion of the problem. An article appeared in a newspaper which spoke of one of the defendants as "identified by the government as an underworld figure here." The two prosecuting attorneys denied giving any such information

to the press and the judge later satisfied himself that no juror had read the article. The Court rejected the defendants argument for a prophylactic rule turning not on prejudice to a defendant but upon "the honor of the sovereign." But the Court went out of its way to say:

> "We do not think that 'identification' by a government employee of a defendant in the midst of a criminal trial as 'an underworld figure' is an incident to be taken lightly, if it occurred. Therefore, in future similar situations, *we would regard as desirable the holding of a hearing* by the District Court at a convenient time to find out who, if anyone, spoke for the 'government,' so that proper measures could be considered . . ." (emphasis supplied)

Neither the District Court, the Court of Appeals or this Court should view lightly the conduct of a U.S. Attorney in leaking to the press the petitioner's prior conviction and his identification as a Mafia leader. Of course, we don't know if the U.S. Attorney actually gave such information to the press because no hearing was held and the U.S. Attorney declined to answer the charge.[8] This Court should review this case to establish definite guidelines for the lower courts in similar situations.

The point we raise now, although presented at the trial level, was not renewed in the appeal to the Court of Appeals. This, however, does not detract from the issue as being a good "cert" question. The record in the trial

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[8] In addition to petitioner's criminal record and his identification as a Mafia leader in Senate hearings—items even an alert reporter might miss in covering an otherwise routine criminal prosecution—the article referred to defendants as being in a "reputed $75,000.00 color television theft ring." The evidence disclosed that 82 television sets were stolen and they were sold for $200.00 apiece. That hardly adds up to $75,000.00. Whether this figure was the hyperbole of the reporter or puffing by the prosecution to suggest there were other hijackings by the "ring" can't be determined without a hearing.

court was made precisely and gives this Court an opportunity to prescribe the proper procedure. This Court is not without jurisdiction to decide the question just because it was not presented to the Court of Appeals. See Rule 40 (1)(d) and *Silver v. United States*, 370 U.S. 717.

CONCLUSION AND RELIEF REQUESTED

This petition tenders to the Court three closely related questions. If certiorari is granted, the Court will have an opportunity to give the trial courts a valuable enchiridion of procedure in handling prejudicial publicity occurring during a criminal jury trial.

For the above reasons we respectfully urge the Court to grant the petition for certiorari.

Respectfully submitted,

PHILIP A. GILLIS
Attorney for Petitioner
2214 Guardian Bldg.
Detroit, Michigan 48226
Wo. 2-1016

Of Counsel
ROSS B. MERETSKY
817 Penobscot Bldg.
Detroit, Michigan 48226
964-6494

August 7, 1970

APPENDIX A

OPINION

Decided and Filed June 1, 1970.

Nos. 20,002-03

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

United States of America,
Plaintiff-Appellee,
v.
Anthony Cimini and John J. O'Malley,
Defendants-Appellants.

Appeal from United States District Court for the Eastern District of Michigan, Southern Division.

Before Phillips, Chief Judge, and Combs and Brooks, Circuit Judges.

Phillips, Chief Judge. John O'Malley and Anthony Cimini appeal their convictions by a jury for violation of 18 U.S.C. § 659 and for conspiracy under 18 U.S.C. § 371. Both were charged in two counts of a three count indictment. Count one charged them with conspiracy to steal, conceal and convert to their own use goods moving as or constituting an interstate shipment. Count three charged them with receiving and possessing the goods knowing them to have been stolen. Four other defendants were charged in on or more of the counts of the indictment, and all were tried in a joint trial.

During the course of the trial certain publicity appeared in local newspapers at Detroit which was the situs of the trial. It concerned some of the defendants with particular mention being made respecting O'Malley's trial counsel. It appears from the record that most of the jurors at least were aware of the publicity, and it further appears that it may have been mentioned in the jury room. On voir dire examination by the court, however, every juror affirmed that no publicity nor any mention of it had affected his ability to render a fair and impartial verdict.

On this appeal both Cimini and O'Malley urge that the publicity was such that they were deprived of a fair trial. We find this contention to be without merit. At worst the publicity was no more than mildly adverse. A reading of the record convinces us that the defendants were not prejudiced by it. There is not a sufficient showing of prejudice. The publicity complained of was not of the type which would require a new trial without a showing of prejudice, nor was it the type which we could presume to have been prejudicial. *Sheppard v. Maxwell*, 384 U.S. 333; *U. S. v. McElrath*, 377 F.2d 508, 510 (6th Cir.), cert. denied, 395 U.S. 915. See also *U. S. v. Barnes*, 383 F.2d 287, 294 (6th Cir.), cert. denied, 395 U.S. 1040.

No error appearing in the District Court's denial of Cimini's motion for a new trial, the judgment is affirmed as to him.

O'Malley makes two further contentions on his appeal. The first challenges the conviction for conspiracy. It is urged that the evidence does not show that O'Malley was a part of the conspiracy to steal, receive and possess the goods, inasmuch as the evidence shows that he did not enter into the conspiracy until some point after the trailer containing the goods had already been stolen. This contention lacks merit.

The record reveals that shortly after the goods were stolen O'Malley was contacted with respect to helping the defendants store or secrete the goods until they could be disposed of. For the purpose of finding a place to hide the stolen cargo, one of the conspirators went to O'Malley's residence. O'Malley was instrumental in finding a place with sufficient space where the goods could be stored. He participated in unloading them.

As for this conspiracy charge it was necessary to show that the conspiracy encompassed an anti-federal intent, or that its scope was sufficiently broad as to include an anti-federal intent, i.e. intent to steal from interstate commerce, or to steal goods without regard to their source. *Nassif v. U. S.*, 370 F.2d 147, 152 (8th Cir.). It is beyond dispute that the conspiracy involved in this case was sufficiently broad.

The evidence does not show that O'Malley was an original conspirator. By his participation in the storing of the stolen goods, however, he committed acts in furtherance of the conspiracy which justified the jury in concluding that he adopted the conspiracy after it was underway. The rule is that where a conspiracy is already in progress, a late comer who knowingly joins it takes it as he finds it and he may be held responsible for acts committed in furtherance of the conspiracy before he joined it. *Poliafico v. U.S.*, 237 F.2d 97, 104 (6th Cir.), cert denied, 352 U.S. 1052, rehearing denied, 353 U.S. 931; *U. S. v Sansone*, 231 F.2d 887, 893 (2d Cir.), cert. denied, 351 U.S. 987. O'Malley may be held for the original acts of the conspirators without regard to whether at the time he joined the conspiracy he knew the goods had been taken from an interstate shipment, and this includes their agreement to steal the goods.

O'Malley further urges that the evidence fails to prove that he received or possessed the goods, or aided or abeted

in the receiving and possessing. This contention is also without merit. The evidence shows that after O'Malley had arranged for the storage place he opened the door and helped to unload the stolen goods. When part of the goods were to be removed it was O'Malley who was contacted. Notwithstanding that O'Malley lacked a proprietary interest in the storage facility, we hold that he exercised a sufficient degree of custody and control to justify a jury finding that he had either actual possession or most assuredly constructive possession. *U. S. v. Cosalinuovo*, 350 F.2d 207 (2d Cir.).

We find sufficient evidence in the record to suport the conviction of O'Malley on both counts.

Affirmed.

APPENDIX B

JUDGMENT

Nos: 20,002-03

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

United States of America,
Plaintiff-Appellee,
v.
Anthony Cimini and John O'Malley,
Defendants-Appellants.

(Filed June 1, 1970)

Before: Phillips, Chief Judge and Combs and Brooks, Circuit Judges.

Appeal from the United States District Court for the Eastern District of Michigan.

The Cause came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed. No costs awarded. Rule 39(b).

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

APPENDIX C

ORDER

Nos: 20,002-03

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

United States of America,
Plaintiff-Appellee,
v.
Anthony Cipini and John O'Malley,
Defendants-Appellants.

Filed July 13, 1970)

Before Phillips, Chief Judge, and Brooks, Circuit Judge.*

Upon consideration, it is Ordered that the petition for rehearing be and hereby is denied.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

* Judge Combs' resignation from the court became effective before the petition for rehearing was filed and he did not participate in this determination.

APPENDIX D

EXCERPTS FROM THE RECORD IN THE COURT OF APPEALS

(Numerals in brackets with the letter "a" refer to pages of the printed Joint Appendix. Numerals in parentheses refer to pages of trial transcript.)

[59a] Mr. Ziemba: May it please the court, on behalf of Mr. John O'Malley, I am constrained at this time to move this court to declare a mistrial for the reason that indeed on the [60a] 21st day of March 1969, an article appeared on the front page of the Detroit News and it appeared throughout all of the editions of the Detroit News on that date, so far as I could determine, and all of the editions carried the story concerning this trial. My name was mentioned repeatedly through the article and in all of the later (538) editions, later than the first edition, the name of my client, Mr. John O'Malley was mentioned in the paragraph with Mr. Anthony Cimini; and it was pointed out that the trial involved a seventy-five thousand dollar color television set ring and that Mr. Cimini had in 1963 been mentioned before a United States Committee, a United States Senate Committee, as a leader of the Mafia.

There were statements within the article which, by innuendo, reflected upon my ethics in appearing in this trial while still technically on the payroll of the county, Mr. John Williams, an auditor for the County of Wayne, was quoted in that story as saying, quote, just as soon as I heard that Ziemba was engaged in the Federal trial, I ordered him removed from the payroll because of the possible conflict of interest or something of that nature, unquote.

Your Honor, I do not think that the court has received from these fourteen jurors as candid a reply to the questions propounded by the court as the court was entitled to for the reason that the things don't add up in terms of the answers which the court did receive from some of the jurors. If a lady juror did indeed hear in the ladies' room that an article——that such an article did appear in the newspaper, then I think that the only fair (539) inference is that she heard it from a lady in the ladies' room and it was a member of the jury. This is the inference I received. And still no other feminine juror admitted to having discussed this article with another lady juror in the ladies' room nor having read it.

[61a] Apparently some male juror had mentioned in the jury room something—did you read about the—did you read the article—or something of that nature; but none of the male jurors admitted to having brought that to the attention of the jurors and/or having read the article. According to the answers which we have received, not one of the fourteen persons read the article, not one of the fourteen persons heard anything on radio or television; but still Joseph Denis said one fellow said in the jury room that there was an article in the paper; he didn't say what it was. Blanche Gurney said one of the jurors said he read an article and that one of the defense attorneys was a prosecutor. Ed Druzinski said one person said he saw an article one of the lawyers was an assistant prosecutor. Well, who is this mysterious person? He must have been a member of the jury, unless other persons not members of the jury have been permitted to enter the jury room and I don't think that happened at all. So the only conclusion that I can draw, and I ask the court to draw the same conclusion, is that this court did (540) not receive, for one reason or another, full, candid, and honest answers from these fourteen jurors.

I think the court will agree with me that the contents of the articles—of the article which appeared in the Detroit News could be—could be prejudicial to certainly Mr. Cimini and certainly Mr. O'Malley, if not the other defendants. It could be. This court has made a good faith effort to determine whether or not any member of the jury has been adversely affected, prejudicially affected by this article; but this court is not able at this time with confidence to say that some members of this jury have not been adversely prejudicially affected by this news story for the reason that some juror did not come forward and admit that he discussed it in terms of having mentioned the article and that in all likelihood he was the one who read it.

[62a] And on that basis, I ask the court to declare a mistrial.

The Court: Thank you, Mr. Ziemba. Mr. Chalfin.

Mr. Chalfin: If the court please. I concur in everything that my brother counsel, Mr. Ziemba, has made on this record for the purpose of testing and making a motion for mistrial. I do that on the basis that I represent Mr. Anthony Cimini. I have listened to the answers of all the (541) jurors and I concur in the fact that Mr. Ziemba—that not all of them are telling everything. And what hurts me most is that we have had in the past and in the present a lot of publicity based on a certain organization in this town called the Mafia; and to have my client, Anthony Cimini linked with that organization and the dread of people after reading articles, not perhaps the article in the other day, Friday, about the Mafia, and he being classified in that article as a Mafia leader, will certainly prejudice any rights that he may have in this court, particularly in this case.

* * * * *

[64a] * * * The Court: Well, gentlemen, the Court will respectfully decline your motions for mistrial in this matter.

As the Court has indicated on other occasions in chambers, jurors do not live in a vacuum and in this wide area of communications, where we have radio, television and (545) newspaper communication as it is now, that it would be utterly impossible to isolate jurors unless the Court were to put them in a hotel or some place where they would [65a] completely extricate themselves from newspapers, radio, and television.

At each adjournment the Court has admonished the jury not to read anything about this particular case; if anything were to appear on television, to change the channel, or on radio.

The Court feels as though the jury—feels as though, based on the answers that we agreed should be asked the jurors, that the jurors were quite candid with the Court.

The lady who was the ninth juror, Mrs. Leona Caron, prior to her being interrogated, I believe one of the jurors said that they had heard that someone's husband had read an article, and, indeed, when we came to Mrs. Leona Caron, she said that her husband had read an article and that he had discussed it briefly, but that was the extent of the discussion. And the Court went on further to ask her if by virtue of that discussion she would—it would be impossible for her to render a fair and impartial verdict in this case, wherever there was any discussion, as stated by any of the jurors, the Court interrogated further (546) as to the nature and depth of the discussion. And each of the jurors in subsequent answers said that they could be fair and impartial in this matter and render a fair and impartial verdict.

And that is the yardstick the Court would have to use. We can't go into the inner sanctum of each juror's mind. They have sworn as jurors and it is my hope as the Court that they were honest with the Court and honest with you. Based on the answers given to the Court, the Court finds absolutely no reason to declare a mistrial in this case.

Mr. Ziemba: Might I address just an additional observation to the Court?

The Court: Yes, you may, Mr. Ziemba.

Mr. Ziemba: Thank you, your Honor.

[66a] The point your Honor made is a very good one, I think. Juror No. 9 said that her husband read an article and that he mentioned something to her about it and inquired whether the particular attorney was engaged in this trial.

Margaret Lyons, Juror No. 4, indeed, said that a lady said that her husband told her about reading about Mr. Ziemba or something of that nature. So, you have a one to one correspondence there. You have one person stating (547) a lady juror told me this. You have a lady juror admitting that she indeed had a husband who read the article. But, where is the one to one correspondence, your Honor, to Edward Druzinski who said one person said he saw an article on the assistant prosecutor—where is that male individual on this jury who read the article and mentioned it to Druzinski? On that basis, there is only one inference this Court should draw and that is that some one juror who may sit in the ultimate determination of the guilt or innocence of this—of these five defendants—has not met his obligation to be honest with this Court, has not admitted, your Honor. Is that the type of person we want to continue on this jury, somebody—somebody read a newspaper article concerning this case and hasn't owned up to it. Now, that I think is the important point.

Now, Joseph Denis said one fellow said in the jury room that there was an article in the paper. Now, this isn't something that might have been imagined by Mr. Druzinski. Joseph Denis told us that. Blanche Gurney said one of the jurors said he read an article that a defense attorney was a prosecutor. There is some male sitting among those fourteen on the jury, your Honor, who knowingly, deliberately, and perhaps with malice has refused (548) to own up

to this Court on a direct question that he has indeed read that article.

Now, apart from his being prejudiced or his mind influenced, his fairness undermined by the contents of that [67a] article, the very fact that he has not admitted that fact to the Court that he read the article destroys his worth as a juryman, destroys his acceptability to sit here in judgment of these five defendants.

I can't see how the Court can draw any other inference from the answers that the Court elicited from these defendants. It is such a serious matter that I address myself to the Court with perhaps a little more emotion than I am wont to, but I do believe that this is a substantial defect in these proceedings and I do beg the Court to reconsider its decision on defense counsel's motion to declare a mistrial.

The Court: Thank you, Mr. Ziemba.

* * * * *

(551) The Court: Very well. The Court will not alter its prior ruling and the motion for [mis]trial is denied.

[111a] (1134)

Detroit, Michigan
April 3rd, 1969
Morning Session

(The jury is not present.)

The Court: Good morning, gentlemen.

As the Court indicated to you in chambers, I received a note, "Please give us the correct spelling of the defendant's names and their attorneys," signed E. F. Moilewski, foreman.

And as I further told you in chambers, the Court would not give the request of the jury as to the names or correct spelling of the defendants or the attorneys' names.

Now, subsequent to the conference that we had in chambers, the Court received another note which states, "We have reached a verdict, signed E. F. Moilewski, foreman."

Now with that total picture, what is the pleasure of the defense counsel?

Mr. Ziemba: May I ask the Court to repeat for the record what the Court's instructions were to the jury upon dismissal of the jury yesterday at 5:00 o'clock, concerning their resumption of deliberations this morning?

(1135) The Court: The Court at 5:00 o'clock, I told the jury that I would let them go for the evening. They were to return to the court room at 9:00 o'clock this morning and commence their deliberations.

[112a] The Court further instructed the jury that they should not listen to anything that may appear on television or radio about this case or read the papers if anything should appear in the papers about it. Not to discuss the case at home with anyone, and commencing their deliberations at 9:00 o'clock when they came in this morning.

Mr. Ziemba: Very well, I think your Honor will agree that implicit in your Honor's instructions was that deliberations should not begin in the absence of all 12 jurors; is that not true?

The Court: That is correct.

Mr. Ziemba: Then I would respectfully call to the Court's attention that the first note to which the Court adverted, namely the one calling for the correct spelling of the names of the defendants and their attorneys, was handed in to the Court at 9:02 A.M. this morning, and I personally saw juror number 12 passing through the halls, apparently first arriving in the building at approximately the hour of 9:25 A.M.

This indicates to me that the 11 jurors, (1136) assuming that there were 11 jurors in the jury room at 9:00 o'clock violated and disobeyed this Court's instructions as to re-

sumption of deliberations. Because I can construe their sending out the note under the foreman's signature as the decision reached by the persons, the jurors present.

Now, I should also like to place on the record an article which appeared in the Detroit Free Press, a Detroit newspaper, under the date of Thursday, April 3rd, 1969; and I should like the Court to take judicial notice of the fact that the Free Press is a morning paper and it ordinarily reaches the street about 8:00 P.M. on the date previous to its date, which would mean that the Thursday edition would be on the streets of Detroit about 8:00 P.M. on Wednesday, April 2nd.

[113a] And this story appears in the Detroit Free Press under the, you might say the headline, "Jury out in TV Hijack case. A Federal Court jury began deliberations Wednesday in the hijack trial of the Detroit mafia figure and four other men. It is the former Wayne County prosecutor's first case since he left the prosecutor's office a month ago to join the law firm noted for its defense of mafia figures.

"Ziemba was formerly head of the Detroit Crime Commission which investigated the mafia operations. (1137) The jury is considering the guilt or innocence of Anthony Cimini, 48, of 1315 Balfour, Grosse Pointe Park; William Sternbergh, 45, of 23612 Balan, Warren; Daniel Dellin, 27, and Hank Dinverno, 46, both of 18566 Conant; and John C. O'Malley, 40, of 7444 Iowa.

"Carl Ziemba, now a member of the Louisell & Harris" —H-A-R-R-I-S, that's the way it is spelled in the newspaper—"law firm is defending O'Malley in the case.

"The jury adjourned late Wednesday and will reconvene at 9:00 A.M. Thursday. The five are charged with hijacking in connection with the December 18th, 1967 theft of 82 colored television sets from a Detroit railroad yard. The

trial before Federal Court Judge Damon J. Keith lasted three weeks.

"The prosecution's main witness, Walter Gordon, 25, 18566 Conant, testified that five men used a stolen tractor to haul away a 40 foot truck trailer containing the television sets. FBI agents recovered seven of the sets that had been sold to another man at $200.00 each.

"Anthony Cimini, of 1315 Balfour, Grosse Pointe Park, was named as a mafia member by former Detroit Police Comissioner, George Edwards, in a 1963 hearing before a United States subcomittee. He was convicted last November on a federal charge of transporting stolen (1138) securities across the state lines. He is appealing the case."

[114a] That is the end of the article.

Your Honor, there was pre-trial publicity given to the quite ordinary phenomenon of my changing employment, in a manner which carried the heavy innuendos of wrongdoing on my part. There appeared during the course of this trial a first-page article in the Detroit News and in the Detroit Free Press concerning a possible conflict of interest that I might have, since I technically remained on the County payroll and I appeared in this court in the defense of one of the defendants.

I think that the only fair inference that can be drawn from the first note handed out by the jury, calling for a spelling of the names of the defendants and their attorneys is that at least some members of the jury are aware of the publicity given to one whose name is Carl Ziemba, and they're trying to put together the spelling, Z-I-E-M-B-A, with the pronunications of my name which they have heard in this court, which has varied according to the person speaking.

I think that that note, your Honor, indicates that the jury or members of the jury are giving consideration in their deliberation to elements or material to facts which

have no standing whatever, no proper standing (1139) whatever in this particular lawsuit. They have indicated, I think, by their note, that they have violated their oath as jurors; they have violated specifically, demonstratively, this Court's instructions not to begin deliberating until they all were gathered in the jury room.

This jury has demonstrated, your Honor, quite clearly by these two acts alone, not to mention the answers that we got from the jurors when we polled them last after the Detroit News article. They have demonstrated that their usefulness as impartial, unprejudiced jurors has ended.

They should not, your Honor, I respectfully submit, be permitted under these circumstances to return a verdict [115a] in this case. I respectfully move the Court to declare a mistrial.

Mr. Chalfin: If the Court please, I, with the Court's consent, arrived a little late and then was told about the note and the delay of the juror's getting into the jury room after the note was handed to the Court.

On reading the note, I also was acquainted with the article in the Free Press that my brother counsel, Carl Ziemba, has read on this record. I'm not concerned that my name wasn't mentioned as one of the attorneys, and I'm not even flattered that they left it out.

However, I am fearful that I, representing (1140) Anthony Cimini, the defendant in here, and it was being called as to how that article is written, have made him a mafia figure; because of the fact that all the articles that have been written about the mafia commensurate something very vicious, and implies that Anthony Cimini is a member of a certain kind of a tribe which I feel that these people as human beings, and all the stories we have read in the newspaper, referring to Detroit and not one out of town; I am fearful that from the connotations of that note as to the

names—not that I'm concerned about the spelling of my own name, it has been spelled 50 times wrong, just like "Ziemba"; because it is a name perhaps spelled wrong and pronounced wrong. But I'm not concerned about myself.

I am concerned that they want the name, "Anthony Cimini." I am seeing something in the back of their minds, I am acquiring perhaps, that perhaps they are going to connotate Anthony Cimini with an article that has been read; and I am thinking that Anthony Cimini cannot get a fair trial.

In renewing my motion, I am asking for a new trial; [sic] that this jury in my mind and upon this record, is prejudiced.

* * * * *

[116a) * * * Mr. MacDonald?

Mr. MacDonald: Yes, your Honor. If it please the Court, Mr. Dinverno would ask that the record would reflect the motion for mistrial based, one, upon the state [117a] ment of counsel heretofore made, which Mr. Dinverno wishes to be incorporated on his behalf on the record.

Secondly, your Honor, I would move the Court for mistrial on this basis; that this article appearing in the Detroit Free Press Thursday, April 3rd, 1969, on Page 14A, which I don't think it would be necessary to read it at this point. This is the article previously read into the record by Mr. Ziemba. This article, your Honor, appears and was placed in the paper almost simultaneously with the jury's retiring to the jury room on Wednesday last, April 2nd, 1969 to commence deliberations.

Now your Honor, I think that the only fair inference that can be drawn from the presence of this article in the newspaper is that this information was provided by (1143) some member of the United States Department of Justice or the District Attorney's Office in this district. I point particularly to the names and addresses of the de-

fendants. It has been suggested by the Government counsel that the Government practices that the release of a press release of comments of a criminal act would include this information.

However, I think it significant to note that the ninth paragraph of this article contains a synopsis of the testimony of Mr. Walter Gordon. I think, also, that it is significant to note that the names and addresses of the named defendants in this case does not contain the name of Mr. Walter Gordon, whose name was contained on the indictment.

And if indeed it was that indictment which was released, it appears evident that someone has informed them that Mr. Gordon is no longer a member of this indicement, that in fact, he is the prosecution's main witness according to Paragraph 9.

Further, it states what his testimony is, that testimony not being found in the indictment; and particularly, it re-
[118a] fers in the last paragraph, that being 11, it refers to the criminal record of the defendant, Cimini; which I believe is highly prejudicial, not only to Mr. Cimini, but to all the defendants; in that Cimini did not testify and this criminal record is of no moment in his (1144) not taking the stand.

I had occasion yesterday to be in the hallway and to see the representative of the Detroit News who wrote this article, and at that time he had in his possession a copy of the indictment in this case as well as certain handwritten notes, the contents of which I am not aware, but which were expressed by him to be the names and addresses of all the defendants. He had indication to inquire of the Government as to whether he had at that time all of the pertinent information in this matter. It was indicated

affirmatively that he had; and then he turned to the Court reporter and informed him that at this time they could turn in the story.

They left the hallway for a few moments and then returned to the courtroom.

I think that the release of this information by the Government, there having heretofore been a great deal of discussion relative to publicity in this case, all persons being on notice that the interest of justice; and that the Court as well, I assume, dictated that there should be as little publicity as possible. Certainly I think the release of this information at this crucial time in the case certainly exhibits a bad faith on the part of the Government. And I would, those are the reasons for the mistrial.

(1145) And then I have a request, and that is I would request that the Court would ask the jury if indeed they have determined the proper spelling of the attorneys; and if so, from what source they obtained that information; and whether or not they have had occasion to review this [119a] morning's Free Press, Page 14A, particularly the article relating to the case.

The Court: Mr. Muellenberg.

Mr. Muellenberg: If your Honor please, the Government opposes any motion for a mistrial as far as the publicity is concerned. I think this record is abundantly clear.

* * * * *

Mr. Muellenberg: As far as the publicity is concerned, I think this record will speak for itself that (1146) the Court repeatedly throughout the trial has admonished the jury to avoid newspapers and any publicity that may exist as far as the charges by Brother MacDonald as to the bad face [sic] of the Government, I don't want to take the Court's time to even get into that.

The note from the jury which Mr. Ziemba discussed at great length, I don't think it is my function or my responsi-

bility to speculate as to the significance or meaning of notes given by a jury to the Court, and I will not comment on that. But the Government strongly opposes any motion for a mistrial.

The Court: Well, the court will deny the motions for a new trial as made by the attorneys.

Mr. Ziemba: Your Honor—

The Court: Just a minute, please. May I say something?

Mr. Ziemba: Yes, your Honor. But your Honor did use the term "new trial."

The Court: I mean a mistrial, for a mistrial.

And as I told the attorney's in chambers prior to getting the subsequent note, that I would not give the jury the names of the defendants or their correct spelling, or the names of the attorneys. It was after that when (1147) we were about to come back in the courtroom, that the Court received a subsequent note which states, "We have reached a verdict," signed by the foreman.

[120a] And the prior note in terms of the correct spelling of the defendants' names were never given to the jury.

As you gentlemen know, as we discussed in chambers, it is difficult to speculate as to what jurors mean or what they intend by a note. They ask one question and within an hour or 45 minutes after they say: "We have reached a verdict," and the Court has never given them this information; while we were in there discussing what do they mean by these questions.

The Court has continually admonished the jury not to read the paper, television or the radio, and that each time, on one occasion we spent a whole morning interrogating the jurors individually as to whether or not they had read anything about this case; or more specifically, about you, Mr. Ziemba.

I might say, Mr. Ziemba, you have been most candid with the Court. You have told them about some of the problems that you might encounter; you asked to be relieved of trying this case until this possible conflict of interest might be resolved. The Court ordered you to appear here and (1148) try this case. Someone else from your office put on the record that it was through the Court's order that you were here and you did not in any way want to prejudice your client, Mr. O'Malley, or by your presence here prejudice any of the other defendants so involved here.

I think the Court has extended the arms of this Court as far as it possibly can into the protection of you in case of any possible conflict of interest, or your client. More, I cannot say.

Would you please bring in the jury?

* * * * *

SUPREME COURT, U. S.

FILED

In the Supreme Court of the United States

OCTOBER TERM, 1970

ANTHONY JOSEPH CIMINI, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN O'MALLEY, PETITIONER

v.

UNITED STATES OF AMERICA

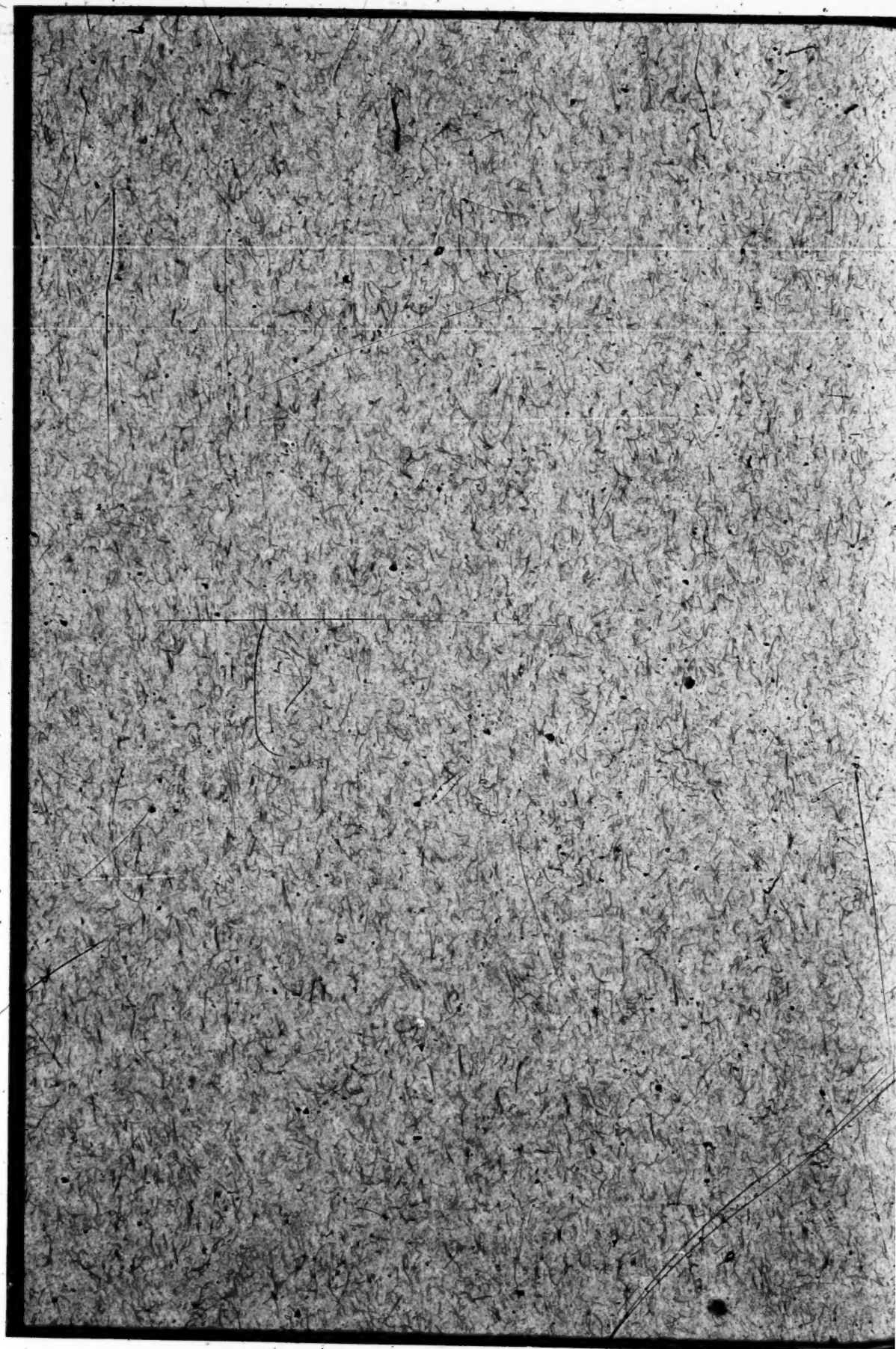
ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WM. D. RUCKELSHAUS,
Assistant Attorney General,

ROBERT A. PARKER,
Attorney,
Department of Justice,
Washington, D.C. 20530.



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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 520

ANTHONY JOSEPH CIMINI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 521

JOHN O'MALLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 520 App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1970. A petition for rehearing was denied on July 13, 1970. On August 10, 1970, the petitions for writs of certiorari were filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether during the course of the trial the court properly denied petitioners' motions for mistrial on the ground that some jurors had been exposed to newspaper publicity, where on individual interrogation each juror had indicated that such exposure would not affect his ability to render an impartial verdict.

2. Whether the trial judge properly declined, during the jury's deliberations, to hold a hearing on petitioners' motions for a mistrial based upon allegations that the jury had been exposed to a prejudicial newspaper article appearing the previous night.

3. Whether the trial judge, *sua sponte*, should have held a hearing to determine whether the prosecution had provided information contained in the latter newspaper article.

STATEMENT

After a jury trial, petitioners were convicted in the United States District Court for the Eastern District of Michigan of conspiracy to steal from interstate commerce (18 U.S.C. 371) and of possession of property stolen from an interstate shipment (18 U.S.C. 659). Petitioner Cimini was sentenced to concurrent

terms of four years' imprisonment; petitioner O'Malley was sentenced to concurrent five-year prison terms. The court of appeals affirmed (Pet. No. 520 App. A).

1. During the week-end recess following the first week of trial[1] an article relating to defense attorney Carl Ziemba appeared in one of the Detroit daily newspapers. After motions for a mistrial were made, all the members of the jury assigned to try the case were individually questioned by the trial court. Each denied reading the article. One female juror stated that her husband had read a portion of it to her. The questioning further revealed that there was some discussion of the article among certain of the jurors and nine members of the jury were aware of this discussion. The conversation was apparently very brief and was limited to the fact that one of the defense attorneys had been a prosecutor. There was a favorable comment on the intelligence of one defense attorney, presumably Mr. Ziemba. Every juror affirmatively stated that the discussion had not impaired his ability to render a fair and impartial verdict (Tr. 514-537). Based on this showing, the district judge denied the motions for a mistrial.

2. The jury began its deliberations on a Wednesday afternoon (T. 1118). At 3:40 p.m., the jury requested supplemental instructions as to the counts with which each defendant was charged. At this point the jurors

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[1] The trial lasted three weeks and is reported in 1218 pages of transcript, herein designated "Tr." No issue is raised concerning the sufficiency of the evidence.

had apparently elected a foreman (T. 1121). The supplemental instructions were given and the jury was excused for the day at approximately 5:00 p.m. The trial judge admonished them not to read the newspapers or listen to anything on radio or television about the case and to resume their deliberations at 9:00 a.m. the following morning (Pet. No. 520 App. D, 7). At 8:00 p.m. that night, a short article was published on page 14-A of a Detroit daily paper under the caption "Jury Out In TV Hijack Case."[2] The article cited the fact that the instant case was Mr. Ziemba's first since leaving the prosecutor's office to "join the law firm noted for its defense of Mafia figures." It also referred to Anthony Cimini as having been named a "Mafia" member by a former Detroit Police Commissioner in a 1963 hearing before a Senate Subcommittee and said that he had previously been convicted of interstate shipment of stolen securities in a case which was then pending on appeal. (see Pet. No. 520, p. 5, App. D, 8-9). At 9:02 a.m. the following morning, the judge received a note from the jury requesting the names of the defendants and their attorneys (Pet. No. 520 App. D, 7). The court considered the request in chambers with counsel and determined not to grant it. During that time, the court received a further note indicating that the jury had reached a verdict (Pet. No. 520 App. D, 6-7).

At this point the district court asked for suggestions from defense counsel. Mr. Ziemba inquired

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[2] We are lodging a copy of this newspaper with the Clerk of this Court.

whether it was implicit in the Court's instructions to the jury the evening before that they should not resume deliberations in the absence of all twelve jurors. The court responded affirmatively. Mr. Ziemba then stated that he had seen juror No. 12 first arriving in the building at 9:25 a.m. that morning. He argued that this indicated that the other eleven jurors had disobeyed the court's instructions not to resume deliberations in light of the note sent by the jury at 9:02 a.m. After calling the court's attention to the newspaper article which had appeared the previous evening, Mr. Ziemba argued that the only fair inference which could be drawn from the jury's note requesting the correct spelling of the defendants' and their attorneys' names was that members of the jury were giving improper consideration to the newspaper article. He moved that a mistrial be declared. Attorneys for other defendants joined in the motion and moved that the jurors be examined as to whether they had read the newspaper article. After a colloquy, the trial court denied the motion to examine the jurors and to declare a mistrial pointing out that it had continuously admonished the jury not to read the papers or listen to television or the radio (Pet. No. 520 App. D, 7-14).

ARGUMENT

1. Petitioners contend that the trial judge erred in refusing to grant a mistrial after several of the jurors indicated in an individualized *voir dire* examination during the trial that they had discussed an allegedly prejudicial newspaper article. During that

voir dire, however, each juror stated that the discussion did not relate to the case and would not affect his ability to render an impartial verdict. The court below found that "[a]t worst the publicity was no more than mildly adverse" (Pet. No. 520 App. A, 2). However characterized, it was not so inherently prejudicial as to cast doubt upon the jurors' assurances; accordingly the denial of the motion for a mistrial was not an abuse of discretion. See *Marshall* v. *United States*, 360 U.S. 310, 312; cf. *United States* v. *Solomon*, 422 F.2d 1110, 1117-1119 (C.A. 7), certiorari denied *sub nom. Sommer* v. *United States*, 399 U.S. 911.

2. Petitioners contend that the denial of their motions for mistrial or to examine the jurors based upon the article which appeared during the jury's deliberations was erroneous. There was, however, no showing that any juror had read or been exposed to this article. In view of the court's specific admonition to the jurors the previous night to avoid such exposure—an admonition made repeatedly during the trial—and the prior incident in which they had all been questioned following their discussion of a prior newspaper article, it is fair to conclude that the jurors had been impressed with the importance of performing their function without consideration of out of court publicity. Petitioners attempt to undermine this conclusion by contending that the jury's note sent at 9:02 a.m. the following morning (at a time when one of the jurors had not yet arrived), showed that the jury was interested in checking on whether the persons mentioned in the article were the same as those involved in the

trial. The jury, however, had been told not to resume deliberations until all twelve jurors were present. It is thus more reasonable to infer that this instruction was followed and that the note sent at 9:02, before the arrival of the twelfth juror, had been prepared the previous afternoon pursuant to an agreement that it be communicated to the court the next morning. Five defendants were on trial, each represented by a different attorney. The jury had previously requested instructions as to which defendant was charged with which counts, and the logical assumption is that the morning request sought further clarification along the same lines. The contention that the jury must have read the newspaper article was nothing more than tenuous speculation and, under all the circumstances, the trial judge was justified in believing that the jury had followed his repeated specific admonitions about press publicity. See *Frazier* v. *Cupp*, 394 U.S. 731, 735.[3]

3. During the colloquy on the second motion for a mistrial, one defense attorney suggested that the prosecutor may have caused the release of the newspaper article which was the subject of the motion. The attorney alleged that on the previous day in the courtroom hallway he had seen the prosecutor talking

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[3] Petitioners' reliance upon decisions from other circuits as establishing a conflict on this issue is not well taken. The Seventh Circuit decisions cited (Pet. No. 520, 9-10) dealt with prejudicial publicity during trial and the requirement that the trial court interrogate the jurors as to whether they heard or discussed the publicity. The other circuit decisions cited are equally distinguishable on their facts (see Pet. No. 520, 10).

to the reporter who had written the article. According to the attorney, the reporter had a copy of the indictment as well as the names and addresses of the defendants; the reporter asked the prosecutor whether he had all the pertinent information in this matter; and the prosecutor responded affirmatively and told the reporter that he could turn in the story. The defense attorney argued that this demonstrated bad faith on the part of the government necessitating a mistrial (Pet. No. 520 App. D, 11-13).

Petitioners do not contend in this Court [4] that a mistrial should have been granted but argue (Pet. No. 520 10-12) that the trial judge *sua sponte* should have held a hearing to determine whether the prosecutor had caused the story, as it appeared in print, to be released. Cf. *United States* v. *Desist*, 384 F.2d 889, 904 (C.A. 2), affirmed on other grounds, 394 U.S. 244, in which the Second Circuit indicated the desirability of a hearing following the publication of an article during trial referring to one of the defendants as having been "identified by the Govenment as an underworld figure here." The court in *Desist* indicated that a hearing should be held in such circumstances "to find out who, if anyone, spoke for the 'Government,' so that proper measures could be considered, e.g., transmittal of the hearing transcript to the appropriate bar association or to the employee's supervisor." *Ibid.* In the present case there was, however, no indication that a member of the prosecution staff had referred to any defendant in prejudicial terms. The facts alleged

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[4] The issue was concededly not raised in the court of appeals (Pet. No. 520 App. A).

by defense counsel showed only that the prosecutor had told the reporter that he had all the "pertinent information" about the case and "could turn in the story" (Pet. No. 520 App. D, 12-13), not that the prosecutor had read and authorized for release a draft of the article as it appeared.[5] In these circumstances, no hearing was required. Moreover, absent any showing that the jurors read the article, such conduct would not be cause for reversal of petitioners' convictions. See *Desist*, *supra*.

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[5] At the time this charge was made government counsel noted that he did not wish "to take the Court's time to even get into that" (Pet. No. 520 App. D, 13). By this comment he obviously rejected any contention that the government had provided any prejudicial or unauthorized information. In view of the fact that this contention is again being asserted—although it was not raised in the court of appeals—we have made further inquiry into the matter and are satisfied that the only information released to the press was in the standard release made at the time of the indictment—*i.e.* the names, ages and addresses of the defendants, a copy of the indictment and information as to the maximum penalty that could be imposed.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

ROGER A. PAULEY,
Attorney.

OCTOBER, 1970.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 520 and 521

ANTHONY JOSEPH CIMINI, Petitioner

v.

UNITED STATES OF AMERICA

JOHN O'MALLEY, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO UNITED STATES BRIEF IN OPPOSITION

PHILIP A. GILLIS
ROSS B. MERETSKY, of Counsel
Attorneys for Petitioner Cimini
2214 Guardian Building
Detroit, Michigan 48226

JOSEPH W. LOUISELL
Attorney for Petitioner O'Malley
2066 Penobscot Building
Detroit, Michigan 48226

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 520 and 521

ANTHONY JOSEPH CIMINI, Petitioner

v.

UNITED STATES OF AMERICA

JOHN O'MALLEY, Petitioner

v.

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The thrust of the government's argument seems to be that a defendant on trial is not entitled to a hearing unless in advance of hearing he is able to prove those facts which only a hearing can bring out.[1] This is reminiscent of Will

[1] "There was, however, no showing that any juror had read . . . this article." U. S. Brief in opposition, p. 6. "The contention that the jury must have read the newspaper article was nothing more than tenuous speculation." id, p. 7. "There was, however, no indication that a member of the prosecution staff had referred to any defendant in prejudicial terms." id, p. 8.

Rogers' description of a bank as a place where a fellow can borrow money if he can prove he doesn't need to.

The government brief, p. 7, footnote 3, attempts to explain away the conflict of circuits by asserting that the other circuits were dealing with prejudicial publicity "during trial." If there is a distinction between jury exposure to prejudicial publicity during trial and exposure to such during deliberations—the government articulates none—the latter more urgently requires a hearing to assure that the jury has been "immunized from outside influence." *U. S. v. D'Antonio* (CA-7, 1965) 342 F2d 667.

Finally, at page 9 of its brief the government goes outside the record to assert that the only information given to the press was in the "standard release made at the time of the indictment—, i.e., the names, ages and addresses of the defendants, a copy of the indictment and information as to the maximum penalty."[2] Aside from the fact that the

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[2] We believe that the Solicitor General has been misinformed as to the nature of the "standard release" in the Detroit area. The special task force agents and attorneys who handled petitioners' prosecution were responsible for the indictment of petitioner Cimini two weeks ago on an unrelated matter. The acting U.S. Attorney and the Agent in charge were interviewed on television as follows:

> Commentator: "Acting U.S. Attorney Ralph Guy and FBI Special Agent in Charge Neil Welsh detailed events leading up to the arrests early this morning."
>
> RALPH GUY: ". . . ment (the station started the voice late here) which was returned earlier this week charging fifteen individuals, *seven of whom have been identified at various times as members of the Detroit area organized crime syndicate. The indictment also mentions one other person, not a defendant, who has been mentioned in testimony before the United States Senate. The eight* individuals so identified include Jack Tocco, Dominic Corrado, Matthew Rubino, Anthony Besase, Dominic 'Sparky' Corrada, Peter Vitale, and Anthony Cimini. The indictment specifies that

(continued on next page)

record here, even without a hearing, belies the assertion since at least some information was given to the press by the government *during trial* [D-12], the ex parte, off-the-

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(continued from preceding page)

in 1960 a scheme was devised whereby three individuals set up a furniture store with the specific purpose in mind of securing merchandise, dissipating the assets, and then throwing the business into bankruptcy, thus fraudulently defrauding creditors. In 1962 three individuals were indicted on this charge, two of them were convicted, and the third was acquitted. The defendants that were arrested today are specifically charged with aiding and abetting in the dissipation of the assets and the merchandise, in connection with the bankruptcy fraud knowing that the whole operation was originally conceived to be put into bankruptcy."

COMMENTATOR: "Specifically who, that's named in the indictment is connected with the Hazel Park Raceway?"

NEIL WELSH: "Well, Jack Tocco, of course, is on the Board of Directors and is one of the executive officers at the Race Track. And there's one other individual as well."

(Transcript of broadcast of September 25, 1970 on WXYZ-TV at 6 p.m. as recorded by Radio TV Reports, Inc., 41 East 42nd Street, New York, N.Y. 10017. Emphasis is added.)

A page one story in the local paper of the same day read, in part:

"[Neil J.] Welsh [Michigan Head of the FBI] said eight of those named in the indictment have been identified at various times as 'members of the Detroit-area organized crime syndicate.'

"Tocco and Corrado were named by the Department of Justice in the Congressional Record on Aug. 12, 1969, as being among the 'top nine Mafia leaders in Detroit.'"

The article went on to give details of the evidence—details which were not in the indictment.

"Finally, as federal agents say the alleged schemers fully expected, the firm's creditors demanded an accounting. . . . That fall . . . store employees . . . stashed the goods, it is charged, in two hidden warehouses—first on Warren and later on Mack." (Ironically, upon defense demands for such information prior to moving for a bill of particulars, the government refused to furnish the defense with the information contained in the press release.)

record, months after the fact investigation by the Solicitor General hardly can be an adequate substitute for an adversary hearing in open court at the time of trial.

Respectfully submitted,

PHILIP A. GILLIS
ROSS B. MERETSKY
Of Counsel
Attorneys for Petitioner Cimini
2214 Guardian Building
Detroit, Michigan 48226

JOSEPH W. LOUISELL
Attorney for Petitioner O'Malley
2066 Penobscot Building
Detroit, Michigan 48226

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PHILIP A. GILLIS
Attorney for Petitioner Cimini
2214 Guardian Building
Detroit, Michigan 48226
WO 2-1016

ROSS B. MERETSKY
Of Counsel
817 Penobscot Building
Detroit, Michigan 48226
964-6494

JOSEPH W. LOUISELL
Attorney for Petitioner O'Malley
2066 Penobscot Building
Detroit, Michigan 48226
WO 2-8210

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Petitioners, Anthony Joseph Cimini and John J. O'Malley, hereby petition the Supreme Court for rehearing of its order denying the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Petitioners' reasons are as follows:

I.

AS A MATTER OF PUBLIC RELATIONS, THIS COURT SHOULD LET THE STATES KNOW THAT IT WILL PATROL THE FEDERAL COURTS TO PREVENT UNFAIRNESS WITH THE SAME VIGOR THAT IT DISPLAYS IN PREVENTING THE STATES FROM VIOLATING DUE PROCESS.

In the past half century, this Court has reviewed a substantial number of state convictions involving constitutional questions related to pretrial and trial publicity. For example see *Shepherd v. Florida* (1951), 341 U.S. 50 (concurring opinion); *Irvin v. Dowd* (1961); 366 U.S. 717; *Rideau v. Louisiana* (1963), 373 U.S. 723; *Sheppard v. Maxwell* (1966); 384 U.S. 333; *Moore v. Dempsey* (1923), 261 U.S. 87; *U. S. ex rel. Darcy v. Handy* (1956), 351 U.S. 454; *Estes v. Texas* (1965), 381 U.S. 532; *Beck v. Washington* (1962), 369 U.S. 541; and *Stroble v. California* (1952), 343 U.S. 181.[1]

Most of these cases generated extensive and multiple opinions in this Court. During the same period, by way of contrast, not a single authored opinion has come out of this Court relating to pretrial or trial publicity in a Federal case. Only once has the Court written on this subject at all and that was the brief *per curiam* opinion in *Marshall v. United States* (1959), 360 U.S. 310.

The failure of the court to consider such questions in the context of a Federal prosecution was not from a lack of opportunity. The issues have been unsuccessfully tendered to this court on many occasions. For example, see *Miller v. United States*, 392 U.S. 929, denying certiorari to *U. S.*

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[1] Decision in each case did not always turn on the publicity issue nor was the prisoner always successful. The only point we make is that this Court was willing to review the questions.

v. Miller, 381 F. 2d 529, and the number of cases cited in the annotation at 3 L ed 2d 1250 wherein this court denied certiorari to review such questions in Federal prosecutions.

This Court has often said that the administration of justice must not only be fair but it must have the appearance of fairness. The Court should rightly concern itself with the appearances created by the exercise of its powers. If it appears that this Court is ignoring its own backyard while enforcing a cleanup program against the state courts, such will not promote the harmony which should exist among the partners in our dual judicial system.[2]

II.

THE DECISIONS OF THE COURT ON DIRECT AND HABEAS CORPUS REVIEW OF STATE CASES, TURNING AS THEY DO ON THE SOLE ISSUE OF DUE PROCESS, DO NOT OFFER SUFFICIENT GUIDELINES TO THE FEDERAL COURTS UNLESS THIS COURT IS PREPARED TO SAY THAT UNFAIRNESS IN FEDERAL PROSECUTIONS IS TOLERABLE IF NOT SO UNFAIR AS TO BE A DENIAL OF DUE PROCESS.

In *Sheppard v. Maxwell,* much of what the Court said would have been more appropriate to a case in which it was directly reviewing the judgment of a court over which it had supervisory power.[3] For example, what the Court

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[2] Appearances can be deceiving. For example, this court summarily reversed a Federal conviction in *Janko v. United States,* 366 U.S. 716 because of prejudicial trial publicity, but it did so without opinion. The judicial politics of our dual system requires that this Court let the states know by formal opinion from time to time that it is imposing upon the Federal Courts the same limitations that it imposes upon the state courts in this area of trial publicity.

[3] "[We possess] no such corrective power over state courts as we do over the Federal courts." *Hoag v. New Jersey* (1958), 356 U.S. 464, 471.

suggested as procedure for the trial court to follow in handling publicity near or at the time of trial, 384 U.S. 358-362 was clearly dictum stated only by way of argument to support the ultimate conclusion that *Sheppard* was denied due process by the Ohio Court.

Contrast the extensive opinion in *Sheppard* with that in *Marshall*. While the court specifically recognized its duty "in the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the Federal Courts", 360 U.S. at 313, *its holding was confined to one brief paragraph* which opened:

> "The trial judge has a large discretion in ruling on the issue of prejudice . . . Each case must turn on its special facts." 360 U.S. at 312.[4]

This language so watered down the decision that the Sixth Circuit was able to cite it rather than the actual holding which followed and thus sustained the conviction in *United States v. Rubino*, decided July 30, 1970.

Certainly the trial judge should have discretion in handling the publicity problem. But just as certainly he should be given more specific guidelines to aid him in the exercise of that discretion. The dictum of *Sheppard v. Maxwell* is not an adequate substitute for instructions from this Court in a case in which it is exercising its supervisory power.

If those members of this Court who voted to deny review of this case did so in the belief that the Court's decisions

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[4] The court cited *Holt v. United States* (1910), 218 U.S. 245 a case which, far from being revitalized by current citation, should have been overruled. While the result in *Holt could have* been justified on the theory of waiver by the failure of the defendant to bring the offensive news articles to the attention of the judge before verdict, the actual rationale of decision is clearly inconsistent with the current views of the Supreme Court in applying the due process clause in State cases.

on review of state convictions are sufficient, they are, in effect, saying that a defendant in a federal criminal trial need be protected by the trial judge from adverse publicity only to the extent that due process requires it. This notion has long been rejected.[5]

> "Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force." *McNabb v. United States* (1943), 318 U.S. 332, 340.

In summation, review of the important questions we have presented will permit this Court, either in the exercise of its supervisory power or by implementation of the Fifth Amendment, to conform the practice of the Sixth Circuit to that of the other Circuits and to state in unmistakable language that all Federal courts are, at the very least, under the same obligations which this Court has imposed upon the state courts as a matter of due process under the Fourteenth Amendment.

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[5] If the prosecution should deliberately leak information to the news media which is derogatory to the defendant, this alone might not be a denial of due process under all circumstances. But most assuredly the practice should never be countenanced in a federal prosecution. Declaration of mistrial, reversal of conviction, or other appropriate remedy for such reprehensible conduct should be fashioned by this Court.

[6] Since 2 members of this Court voted to grant certiorari, it hardly can be asserted that the questions do not at least verge on being important.

We respectfully ask that the court reconsider its denial of the petition for writ of certiorari and grant the same.

Respectfully submitted,

PHILIP A. GILLIS
Attorney for Petitioner Cimini
2214 Guardian Building
Detroit, Michigan 48226
WO. 2-1016

Of Counsel:
ROSS B. MERETSKY
817 Penobscot Building
Detroit, Michigan 48226
964-6494

JOSEPH W. LOUISELL
Attorney for Petitioner O'Malley
2066 Penobscot Building
Detroit, Michigan 48226
WO. 2-8210

November 25, 1970

CERTIFICATE OF COUNSEL

The undersigned hereby certifies to this court that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58, Paragraph 2 of the Rules of this court.

PHILIP A. GILLIS
Attorney for Petitioner

November 25, 1970